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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 567

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

Appellee's motion to affirm demonstrates that there is no dispute here as to the essential facts, *i.e.*, the actions taken by Parke Davis in its attempts to enforce resale price maintenance in non-"fair trade" areas. Thus, appellee does not deny that it cut off the price-cutting retailers and induced its wholesalers to do so; and that it resumed selling to those retailers, and permitted its wholesalers to do so, only after they had undertaken to stop, and had stopped, their cut-price advertising.

The basic issue presented by this appeal, therefore, is whether such a course of business conduct amounted to merely the unilateral selection of customers, as the District Court held; or whether, as the Government

contends, it went far beyond "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721) and, under the Sherman Act, constituted an illegal price-fixing conspiracy. Contrary to appellee's contention (Motion to Affirm, p. 4), that question involves far more than the correctness of the trial judge's "assessment of the evidence presented before him"; it squarely raises a "serious question as to the trial judge's understanding or application of the law to the facts as he found them".

For the reasons set forth in our jurisdictional statement (pp. 13–17), we urge that this Court should note probable jurisdiction and decide the important legal questions which this appeal presents.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.

January 1959.